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May 8, 2003

BY HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED

MAY - 8 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Notice
MB Docket No. 02-277
DA 01-1264

Dear Ms. Dortch:

This is to report on three ex parte visits that took place on Wednesday, May 7, 2003 concerning the above proceedings: (1) Alexandra Wilson, Vice President of Public Policy of Cox Enterprises, Inc., Marius Schwartz, Professor of Economics at Georgetown University, and the undersigned counsel for the Network Affiliated Stations Alliance (NASA) met with Johanna Mikes, Legal Advisor to Commissioner Jonathan Adelstein; (2) Alan Frank, President of Post Newsweek Stations and Chair of NASA, James Yager, Chief Executive Officer of Barrington Broadcasting Co., Alex Netchvolodoff, Senior Vice President of Public Policy, Cox Enterprises, Inc., Alexandra Wilson, Cox Enterprises, Inc., Professor Schwartz and the undersigned met with Commissioner Adelstein and Ms. Mikes; and (3) Mr. Yager, Professor Schwartz and the undersigned met with Commissioner Kathleen Abernathy.

We shared with Commissioner Adelstein and Ms. Mikes the attached "35% Cap: Record Evidence and Eleven Misconceptions" and a blown-up reprint of a chart that appeared on page 1 of the April 14 edition of *Broadcasting & Cable*. We shared with Commissioner Abernathy just the former. All three conversations dealt with issues already fully pleaded in the 35% cap proceeding.

With Ms. Mikes, we also briefly described the backdrop of NASA's Petition (DA-01-1264) and gave her copies of documents already in the record in that proceeding.

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Please direct any questions regarding this notice to the undersigned.

Respectfully submitted,


Jonathan D. Blake

*Counsel for the Network
Affiliated Stations Alliance*

Enclosures

cc: Commissioner Jonathan Adelstein
Commissioner Kathleen Abernathy
Johanna Mikes, Esquire
Mr. Alan Frank
Mr. K. James Yager
Mr. Alexander Netchvolodoff
Ms. Alexandra Wilson
Professor Marius Schwartz
Jennifer Johnson, Esq.
Mania Baghdadi
Linda Senecal
Qualex International

THE 35% CAP:

RECORD EVIDENCE
AND
ELEVEN MISCONCEPTIONS

- The first half of this summary shows that the record evidence in this proceeding makes a compelling case for retention of the 35% cap and will not support its relaxation or repeal.
- The second half exposes the fallacy of eleven misconceptions thrown up by the networks to undermine the cap.

May 5, 2003

[Each of the issues addressed is dealt with in more detail in the letters NASA/NAB submitted to the FCC between April 22 and April 30.]

RECORD EVIDENCE

The Evidence In Support Of The 35% Cap Is Overwhelming, Is Largely Unrebutted And Will Not Support Relaxation Or Repeal.

- *independently-owned affiliates have more incentives to serve their local communities than O&Os*

demonstrated by: in-depth economic reports by Schwartz and Vincent, survey of managers who have worked at both O&O and affiliate stations, hearing testimony by station manager that worked at both affiliate and O&O station, evidence of networks' rapidly increasing vertical integration and horizontal expansion, and network statements that O&Os' allegiance to the network parent is "unambiguous" all substantiate that independent affiliates are more responsive to local community interests than O&Os

rebutted by: no contrary evidence in record

- *affiliates preempt more than O&Os*

demonstrated by: despite continued network refusal to disclose complete and underlying preemption data, selective data that was submitted by networks show 40% (up to as much as 316%) more preemptions by affiliates compared to O&Os; recent network *ex parte* submission disclosed that in 1994, affiliates preempted 12 times as much as O&Os in prime time

rebutted by: no contrary evidence in record

- *affiliates preempt for good reasons*

demonstrated by: nearly 1,000 specific affiliate preemptions provided in the record as examples

rebutted by: network criticism of affiliate motivation for some preemptions (*e.g.*, to broadcast religious programs, charity events, telethons, local sports) which amount to second-guessing a few licensee programming decisions

- *affiliates, but not O&Os, preempt network programs that are unsuitable for their local communities*

demonstrated by: examples of affiliate preemptions for this reason in the record; challenge to networks to cite even one example of O&O preemption for this reason remains unanswered

rebutted by: no contrary evidence in record; networks cite not a single O&O preemption based on community standards and do not deny that O&Os never preempt for this reason

- *affiliate preemptions have decreased*

demonstrated by: survey results showing steady decline in affiliate preemptions since mid-1990s, analysis of networks' own data showing 64% decline since 1994; survey results that 60% of affiliates say network pressure not to preempt has increased

rebutted by: no contrary evidence in record; networks criticize their own 1994 data; networks do not address *any* of the data and information submitted by NAB/NASA

- *affiliate local news exceeds network O&O news in quality*

demonstrated by: correcting for market size (as the network economists agree is appropriate) demonstrates that affiliates' local news performance, as measured by awards chosen for FCC study, is *superior* to O&Os; affiliate superiority also is confirmed by analyses of Peabody Awards and by Project For Excellence In Journalism

rebutted by: networks analyze only RTNDA awards to show that affiliates are just *slightly* superior and ignore marked affiliate superiority in DuPont awards; networks fail to address affiliate superiority in Peabody awards

- *affiliate local news is comparable to network O&O news in quantity*

demonstrated by: no difference in news quantity when market size and, in the case of Fox, UHF/VHF distinctions are corrected for – network economists openly concede need to correct for market size and do not dispute need to correct for UHF/VHF distinction, which is the basis for the “UHF discount” under the 35% cap

rebutted by: in last-minute filing networks now claim that taking UHF/VHF differences into account does not eliminate difference in hours, but submit no data, data analysis, citation or any other information to (i) substantiate this claim (ii) allow it to be checked or (iii) rebut NASA/NAB's analysis in the record; since Fox limits affiliates to a miniscule two-hour preemption basket *annually*, the networks' claim is highly suspect

- *independent affiliates influence network programming*

demonstrated by: numerous specific examples of influence in record; two analyses of affiliate board minutes substantiating impact of affiliate input;

evidence showing that this influence has been made precarious by post-1996 industry developments and network aggrandizement

rebutted by: no evidence in record; oxymoronic and irrelevant assertion by networks that O&Os are more reliable sources of local community information because of allegiance to the national network; networks provide not a single example of O&Os trying to influence network programming and do not dispute specific examples of affiliate influence in record

- *independent affiliates promote innovation*

demonstrated by: numerous examples of affiliate innovation in record

rebutted by: no contrary evidence in record; no evidence of O&O innovations in record

- *independent affiliates are more geographically dispersed than the networks*

demonstrated by: group owner headquarters shown to be widely dispersed geographically; network headquarters shown to be in New York or Los Angeles

rebutted by: no contrary evidence in record

- *the networks have increasingly encroached on affiliates' programming discretion; Fox is the worst offender*

demonstrated by: documentation in record: increasingly restrictive provisions in affiliation agreements, network invasions of "station time," survey results and analysis of network data showing fewer affiliate preemptions, survey showing that 60% of affiliates feel more pressure from networks against preemptions, reduced affiliate ability to influence network programming to serve local needs

rebutted by: no contrary evidence in record

- *networks impede access for charitable telethons to affiliates and O&Os*

demonstrated by: input from charities themselves attesting to this fact; network criticism of affiliates for preempting network programming to carry charity telethons

rebutted by: no contrary evidence in record

No Material Evidence Justifies Relaxation Or Repeal Of The 35% Cap.

In contrast to this strong and largely un rebutted body of evidence supporting retention of the 35% cap, there is a dearth of evidence supporting its relaxation or elimination. The networks advance evidence on three points, none of which supports relaxation or repeal of the cap.

- *the networks fail to address the cap's principal rationale: the statutory policy of localism*
 - the networks argue that diversity and competition have increased in local markets, which is irrelevant to the cap's primary purpose of preserving localism
- *the networks submit data purporting to show that neither affiliates nor O&Os preempt that much, but the data are incomplete and flawed and they do show that affiliates preempt network programming substantially more frequently than O&Os*
 - the networks' own data show that affiliates preempt 40% more than O&Os; only the networks have data that enable comparisons between O&Os and affiliates
 - yet the networks refuse to disclose data beyond a single year of their own choosing (2001), despite NASA and NAB's specific request that they disclose data regarding affiliate and O&O preemptions covering a ten year period in order to permit a meaningful analysis
 - they refuse to provide preemption data beyond prime time, which is the least likely time to be preempted for several reasons, including the increasingly stringent prime time preemption baskets imposed by the networks and the fact that many local events (*e.g.*, parades) occur outside of prime time; the higher rate of preemptions outside of prime time is substantiated by the 1994 data the networks previously submitted to the FCC, which also demonstrates that the networks have access to non-prime-time preemption data that they have chosen not to submit
 - they refuse to provide the underlying data or methodologies even for the limited data they do submit
 - the networks do not deny or rebut NASA/NAB preemption data, which demonstrate a higher level of preemptions than reported by the networks and a significant decline in affiliate preemptions over time
- *the networks compare preemption rates across networks, which even they admit fails to control for relevant distinctions aside from market reach*

- two weeks ago, the networks submitted a graph purporting to show that in 2001 affiliates of networks exceeding the cap preempted more prime time programming than affiliates of networks below the cap; they continue to refuse to disclose the underlying data and their showing is subject to all of the flaws summarized above
- even putting these deficiencies aside, as explained in Misconception Ten below and as will be rebutted in NASA/NAB and Schwartz/Vincent responsive filings, this showing is meaningless because (as the networks themselves concede) it has not been corrected to account for other differences between the networks that could impact preemptions

ELEVEN MISCONCEPTIONS

Misconception One: There is no difference for the viewer between the service provided by a station owned by a large network based in Hollywood and the service provided by a network-affiliated station owned by a large (non-network) company based in some other distant city.

Economic analyses and factual data show that:

- *Network O&Os are subservient to the broader business interests of their network parent companies' rapidly increasing media empires, while independently-owned affiliates focus on the needs of their local communities.*
- *The only contrary "evidence" is the networks' stated preference to deal with O&Os that are more loyal to the networks' business interests, which is a powerful reason to retain the cap.*

Misconception Two: The future of free, local and universal television service requires lifting the cap because the networks need to own more stations in order to be more profitable to survive in the new competitive environment.

- *By definition, owning more stations will not make the networks more profitable, as networks.*
- *The record contains not a scrap of evidence showing network poverty or financial fragility.*
- *The broadcast operations of the networks' parent companies are quite profitable, and the network operations greatly enhance the value and profitability of other network businesses – stations, program production, syndication, foreign sales, and cable and Internet programming.*

- *It cannot be correct that the government should set a national ownership cap at a level intended to achieve a certain level of network profits. Nothing in the Act or the Fox decision would support that reasoning. Even the networks don't suggest that should be the case.*

Misconception Three: Marketplace changes since 1996, particularly an increase in media voices such as the Internet, justify relaxing or repealing the cap.

- *The record contains no evidence that affects the localism rationale that is the principal reason for the cap. The networks focused their case primarily on showing more competition and more diversity since 1996.*
- *Structurally, the unrebutted evidence shows dramatic network vertical integration and horizontal expansion since 1996, including a doubling of station ownership.*
- *Behaviorally, unrebutted evidence shows increased network dominance over affiliates in a variety of specific and documented respects.*

Misconception Four: Congress and the Court imposed an “insurmountable” hurdle on the FCC to uphold the 35% cap.

- *This contention is sheer nonsense. The Fox Court made clear that it was remanding the FCC's biennial review decision to retain the 35% cap because that decision was supported by a mere one-paragraph explanation.*
- *The Fox Court went on to say that, on remand, it was not unlikely that the Commission would be able to justify retention of the cap.*

Misconception Five: Congress imposed a higher burden to retain the 35% cap than to relax or repeal it.

- *Under the language of the 1996 Act, as interpreted by the Fox Court, the case for relaxation of the cap must be based on changes in competition since 1996 that vitiate the rationale (principally, localism) for the 35% cap. The record is bereft of evidence to this effect.*
- *Any decision – retention, relaxation or repeal – must be based on a public interest calculus that includes localism.*
- *The FCC in an analogous biennial review proceeding found that the appropriate standard is not “more stringent than the ‘plain public interest standard’ found in other parts of the Communications Act.”*

Misconception Six: A relaxation of the local rules would call for parallel relaxation of the national ownership cap.

- *The Fox Court explicitly rejected this argument.*
- *In fact, the bedrock principle of localism justifies retention of the 35% cap and relaxation or repeal of the local ownership rules. Both steps would promote the public interest and localism.*

Misconception Seven: Because the FCC's 30% national cable cap was overturned in court, therefore, the 35% national television ownership cap is not sustainable.

- *The Fox Court also explicitly rejected this argument.*

Misconception Eight: Enforcement of the FCC's right-to-reject rule is an acceptable substitute for the 35% cap.

- *The 35% national ownership cap, on the one hand, and the network/affiliate rules and the statutory principle of independent licensee responsibility, on the other, are mutually complementary. Both are needed to preserve localism.*
- *Networks can gut localism by station ownership beyond a certain level (here shown to be 35%) or forcing them into contracts or engaging in other practices that deprive them of the ability to serve local interests.*

Misconception Nine: The record could support a 40% cap or a 45% cap.

- *The record contains not a scrap of evidence to support a 40%, 45% or 50% cap and will not support repeal of the cap either. Relaxation or repeal of the cap will not withstand judicial scrutiny based on the existing record.*
- *There is no evidence that, as a result of relaxing the cap, affiliate preemptions would be healthy or that affiliates would influence network programming to be responsive to local community standards.*
- *On the other side, there is compelling evidence, some provided by the networks themselves, of declining affiliate preemptions, of a disparity between affiliate and O&O preemptions and of precarious affiliate influence over national network programming.*
- *And the unrebutted record evidence also shows the networks' aggressive vertical integration and their expansion into non-broadcast businesses – trends that inexorably undercut the networks' incentives to serve the principle of localism and make the public interest role of independent affiliates ever more important.*

Misconception Ten: To uphold the cap, it is not necessary to show that the networks with the largest penetration (Fox and CBS) are the worst encroachers on local licensee discretion, but in fact it has been shown that Fox is the most aggressive.

- *The networks waited until April 21 to advance the argument that affiliates of the networks with the highest national penetration preempt the most, based on prime time-only data from a single year; yet, though asked to do so six months ago, they continue to refuse to disclose the underlying data, to disclose preemption rates outside of prime time, or to provide information beyond a single year of their own choosing.*
- *The assertion is not credible with respect to Fox since it allows affiliates only a two-program preemption basket per year – by far the lowest of any major network. In fact, Fox is the most aggressive of all the networks in encroaching on its affiliates' independent programming discretion. See NASA Petition.*
- *It is only necessary to demonstrate that the 35% cap is needed to preserve localism, and that has been shown by decreasing affiliate preemptions, far greater network power, and increasing network intrusions into local programming discretion.*

Misconception Eleven: The Commission is not required to give weight to the principle of localism.

- *Localism is rooted in the statute and, as a powerful component of the ever-fresh public interest standard, has been repeatedly invoked to the present date to support actions by Congress, the Commission and the Court. The Commission is not free to devalue it or pay it only lip service.*
- *A decision to relax or repeal the 35% cap could not be squared with the public interest imperatives of localism.*

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